



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA-HQ-OAR-2004-0094; FRL-10019-05-OAR]

RIN 2060-AU98

Court Vacatur of Exemption from Emission Standards During Periods of Startup, Shutdown, and Malfunction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is amending the Code of Federal Regulations (CFR) to reflect a court order regarding the General Provisions for National Emissions Standards for Hazardous Air Pollutants (NESHAP) issued on December 19, 2008, by the United States Court of Appeals for the District of Columbia Circuit (the court). The court vacated two provisions in the General Provisions that exempted sources from hazardous air pollutant (HAP) non-opacity and opacity emission standards during periods of startup, shutdown, and malfunction (SSM). The court held that under the Clean Air Act (CAA), emissions standards or limitations must be continuous in nature and that the SSM exemptions in these two provisions violate this requirement. This ministerial action revises these two NESHAP General Provisions in the CFR to conform to the court's order.

DATES: This final rule is effective on **[Insert date of publication in the Federal Register]**.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-HQ-OAR-2004-0094. All documents in the docket are listed in <https://www.regulations.gov/>.

Although listed, some information is not publicly available, *e.g.*, Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. With the exception of such material, publicly available docket materials are available electronically in <https://www.regulations.gov/>. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID-19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. The EPA continues to carefully and continuously monitor information from the Centers for Disease Control and Prevention, local area health departments, and our Federal partners so that we can respond rapidly as conditions change regarding COVID-19. For further information and updates

on EPA Docket Center services, please visit us online at <https://www.epa.gov/dockets> or call the Public Reading Room at (202) 566-1744 or the EPA Docket Center at (202) 566-1742.

FOR FURTHER INFORMATION CONTACT: Lisa Conner, Sector Policies and Programs Division (D205-02), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone number: (919) 541-5060; fax number: (919) 541-4991; email address: conner.lisa@epa.gov. You may also consult your state or local permitting representative or the appropriate EPA Regional office representative.

SUPPLEMENTARY INFORMATION:

Organization of this document. The information in this preamble is organized as follows:

- I. Why is the EPA issuing this final rule?
- II. Background
- III. Which provisions are being amended?
- IV. Statutory and Executive Order Reviews

I. Why is the EPA issuing this final rule?

This action is amending the CFR to reflect the 2008 court decision in *Sierra Club v. EPA* vacating 40 CFR 63.6(f)(1) and (h)(1). Section 553 of the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(B) provides that, when an agency for good cause finds that notice and public procedures are impracticable, unnecessary or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. The EPA has determined that there is good cause for amending these provisions without prior proposal and opportunity for public procedures because the correction of the CFR is a ministerial act to effectuate the court order and public notice and comment is unnecessary and would serve no useful purpose. Removal of the two SSM exemptions in the General Provisions of the NESHAP at 40 CFR 63.6(f)(1) and (h)(1) has no legal effect beyond fulfilling the court's vacatur in *Sierra Club v. EPA*, 551 F. 3d 1019 (D.C. Cir. 2008) and is ministerial in nature. The court issued the mandate for its decision on October 16, 2009, at which point the vacatur became effective.

II. Background

The NESHAP program implementing requirements in section 112 of the CAA regulates over 100 industrial source categories that emit HAP. The NESHAP regulations applicable to specific source categories are organized by subparts within part 63 of 40 CFR.¹ As a component of 40 CFR part 63, the EPA established subpart A which contains the General Provisions and,

¹ A list of the source categories regulated in the NESHAP program can be found at: <https://www.epa.gov/stationary-sources-air-pollution/national-emission-standards-hazardous-air-pollutants-neshap-9>.

when incorporated by reference within a specific source category NESHAP, eliminates unnecessary repetition of general information and requirements that often apply (*e.g.*, emission testing, monitoring, recordkeeping, and reporting provisions). As a result, the General Provisions contain requirements that are general in nature and apply only if the source category-specific NESHAP subpart states that some (or all) of the subpart A requirements apply. *See* 59 FR 12408, 12408/3 (March 16, 1994) (“1994 Rule”). The General Provisions have the legal force and effect of emission standards when incorporated by reference into a NESHAP. 40 CFR 63.1(a)(4).

Beginning in 2002, the Sierra Club and various other environmental groups filed petitions seeking judicial review of the SSM exemptions in the NESHAP General Provisions in 40 CFR part 63, subpart A. In response to these petitions, the court vacated portions of two provisions governing the emissions of HAP during periods of SSM. *Sierra Club v. EPA*, 551 F. 3d 1019 (D.C. Cir. 2008). Specifically, the court vacated the SSM exemptions contained in 40 CFR 63.6(f)(1) and (h)(1) of the General Provisions. When incorporated by reference into the NESHAP regulations for specific source categories, these two provisions exempted sources from the requirement to comply with the otherwise applicable emission standards during periods of SSM. The court held that under CAA section 302(k), emissions standards or limitations issued pursuant to section 112 of the CAA must be continuous in nature and that the SSM exemptions in 40 CFR 63.6(f)(1) and (h)(1) violate this CAA requirement.

As noted above, the court mandated its decision on October 16, 2009, making it immediately effective. However, 40 CFR part 63, subpart A, has not yet been amended in the record. Since then, the EPA has been codifying the court decision by modifying SSM exemptions in individual NESHAP as they are opened for review and modification.

III. Which provisions are being amended?

This final rule amends the NESHAP General Provisions at 40 CFR part 63, subpart A, to remove universally the SSM exemptions contained in 40 CFR 63.6(f)(1) and (h)(1) from non-opacity and opacity emission standards, respectively, by deleting the phrase “except during periods of startup, shutdown, and malfunction.” As explained above, removal of the exemptions corrects the CFR to conform to the court's order in *Sierra Club v. EPA* and so is ministerial in nature and has no legal effect. The legal effect of the vacatur occurred upon the court’s decision in 2008 and subsequently in the court’s mandate issued in 2009.

IV. Statutory and Executive Order Reviews

Additional information about these statutes and Executive orders can be found at <https://www.epa.gov/laws-regulations/laws-and-executive-orders>.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563:

Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was, therefore, not submitted to the Office of Management and Budget for review.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden, or otherwise has a positive economic effect on the small entities subject to the rule. This regulatory action is ministerial in nature as it codifies a court issued mandate vacating regulatory provisions. We have, therefore, concluded that this action will have no net regulatory burden for all directly regulated small entities.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538. This action imposes no enforceable duty on any state, local, or tribal governments or the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. The action presents no additional burden on implementing authorities beyond existing requirements. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes that this action is not subject to Executive Order 12898 (59 FR 7629, February 16, 1994) because it does not establish an environmental health or safety standard. This regulatory action is ministerial in nature as it codifies a court issued mandate vacating regulatory provisions and does not have any impact on human health or the environment.

K. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. The CRA allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and comment rulemaking procedures are impracticable, unnecessary, or contrary to the public interest (5 U.S.C. 808(2)). The EPA has made a good cause finding for this rule in section I of this preamble, including the basis for that finding.

List of Subjects for 40 CFR Part 63

Environmental protection, Administrative practice and procedures, Air pollution control, General Provisions, Hazardous substances.

Jane Nishida,
Acting Administrator.

For the reasons set forth in the preamble, the EPA amends 40 CFR part 63 as follows:

PART 63 – NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR

POLLUTANTS FOR SOURCE CATEGORIES

1. The authority citation for part 63 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart A - General Provisions

2. Revise §63.6(f)(1) and (h)(1) to read as follows:

§63.6 Compliance with standards and maintenance requirements.

* * * * *

(f) * * *

(1) *Applicability.* The non-opacity emission standards set forth in this part shall apply at all times except as otherwise specified in an applicable subpart. If a startup, shutdown, or malfunction of one portion of an affected source does not affect the ability of particular emission points within other portions of the affected source to comply with the non-opacity emission standards set forth in this part, then that emission point must still be required to comply with the non-opacity emission standards and other applicable requirements.

* * * * *

(h) * * *

(1) *Applicability.* The opacity and visible emission standards set forth in this part must apply at all times except as otherwise specified in an applicable subpart. If a startup, shutdown, or malfunction of one portion of an affected source does not affect the ability of particular emission points within other portions of the affected source to comply with the opacity and visible emission standards set forth in this part, then that emission point shall still be required to comply with the opacity and visible emission standards and other applicable requirements.

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